IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 605 OF 1999.

Anil Gulabdas Shah & ors. ... Appellants.
V/s.
Ashram Tiwari. .. Respondents.

Shri S.M. Sakhardande with E.K. Sasidharan for the applicants.

Shri Anil R. Mishra for the respondents.

CORAM : A.M. KHANWILKAR, J.

DATED : 14.8.2006.

P.C. :

. Heard Counsel for the parties.

2. Challenge in this appeal is restricted to the order dated 23rd April 1999, passed on Notice of Motion No. 3246 of 1999. The said notice of motion was filed for the following reliefs:

(a). that order dated 18th February 1998 dismissing the suit be set aside and restored to file for hearing and final disposal of the same on merits.

(b). that abatement if any be set aside.

(c). that Respondents herein be added as a party defendants, as per Schedule annexed hereunder.

(d). that delete the name of defendant.

(e). Consequential amendment permitted.

(f). defendants in place of defendant.

(g). that delay in taking out this Notice of Motion be condoned.

(h) Such other and further relief in the nature and circumstances of the case be granted.

3. The Court below has rejected the notice of motion on the finding that no sufficient cause was made out by the appellant-plaintiff. This is the limited controversy which needs to be resolved in the present appeal.

4. The relevant dates for considering prayer for setting aside abatement and restoring the suit for being tried in accordance with law are as under: The appellant filed the suit on 28th July 1980 for possession of the suit property. Defendant Ashram Tiwari expired on 15th September 1997. Advocate for the defendant informed the Court of this development on 15th December 1997. Matter was adjourned to 16th January 1998, when Advocate for the appellant/plaintiff applied for time to bring on record heirs and legal representatives of the deceased defendant. It is also evident from the record that on that day advocate for the defendant sent letter dated 16th January 1998 in the name of heirs and legal representatives of the deceased defendant. The trial Court passed an order on 18th February 1998 that suit stood abated as no application was filed by the appellant for substitution till then. The appellant-plaintiff filed Notice of Motion No. 3246 of 1998 on 28th

July 1998 for setting aside abatement and for further reliefs allowing appellant to bring on record heirs and legal representatives of the deceased defendant.

5. After having gone through the pleadings and other material on record, in my opinion, in the interest of justice, the trial Court ought to have granted reliefs in terms of prayer clauses (a) to (g) of the notice of motion reproduced earlier. It is submitted that plaintiff No.2 was attending the matter. However, on account of family dispute he did not keep track of the suit since 1997 and thereafter. Brother of plaintiff was looking after the suit. It is also stated that letter was also addressed to the Advocate to take necessary steps. The substance of the explanation is that due to circumstances beyond the control of the appellant, including the mistake of the advocate, the delay has occasioned. Indeed, respondent has denied the stand taken by the appellant. The Court below has found that there was gross and unexplained delay. According to the lower appellate Court the appellants ought to have offered explanation for their inaction since 15th December 1997.

6. In my opinion, however, the approach adopted by the lower Court is not proper. This is because, the fact that the defendant had died was known on

15th December 1997. However, respondent made available details of the heirs and legal representatives on 16th January 1998. Indeed, appellants did not take steps within specified time. The fact remains that the appellants have asserted on affidavit that due to circumstances beyond their control, in particular of the appellant No.1 who was looking after the litigation, appropriate application could not be filed. Amongst others, trial Court has not addressed itself to this aspect of the matter at all. It is well established that for the mistake of the advocate, litigant should not suffer.

7. It is the contention of the appellant that limitation be computed from 16th January 1998. Even if this contention cannot be accepted, it is seen that the time to file application commenced from 15th December 1997 when the information was given in Court and in any case from January 16,1997 when the details of the heirs and legal representatives were furnished. Indeed, the delay is of some days. But the delay is explained and is unintentional. Besides, it is due to reasons beyond the control of the appellants, including due to mistake of the appellant. There is nothing on record to hold that delay so caused is intentional or malafide.

8. Accordingly, in the interest of justice,

impugned judgment and order is set aside and Notice of Motion No. 3246/98 is made absolute in terms of prayer clauses (a) to (g). Appellant to carry out necessary amendment in the motion proceeding within 3 weeks from today, whereafter trial Court shall proceed with the suit on its own merits in accordance with law.

9. Counsel for the respondent submits that there are certain subsequent events which would disentitle the plaintiff to set up claim which is made in the present plaint. It is not necessary for me to enter into this aspect and it is left open to be considered by the trial Court at the appropriate stage. As the suit is of the year 1980, the trial Court will expeditiously dispose of the suit as High Court expedited matter.

(A.M. KHANWILKAR,J.)